United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig. w/ affidavit of mailing

74-1565

To be argued by
GEORGE G. BASHIAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1565

B

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANCISCO SOLIMENE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
GEORGE G. BASHIAN, JR.,
Assistant United States Attorneys,
of Counsel.

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Preliminary Statement

Francisco Solimene appeals from an order of the United States District Court for the Eastern District of New York, (Mishler, *C.J.*), entered March 11, 1974, denying his motion pursuant to Rule 35, Federal Rules of Criminal Procedure, for a reduction of sentence. Appellant had previously been sentenced on May 19, 1972, by the late Judge George Rosling, to a prison term of 15 years and a special parole term of 15 years pursuant to provisions in the 1970 Drug Abuse Control Act. That sentence had followed his conviction, after a jury trial in March of 1972, of having conspired to possess and distribute approximately 155 pounds of heroin in violation of Title 21, United States Code, Section 846.*

* The indictment named three other defendants besides the appellant herein. One of the co-defendants, Louis Boyce, was tried and convicted along with the appellant and sentenced by

[Footnote continued on following page]

On this appeal, appellant's essential claim is that there are two erroneous statements in his presentence report which, he urges, were improperly relied upon by Judge Rosling at the time he was sentenced and by Judge Mishler at the time when his motion to reduce the sentence was denied. Appellant urges, therefore, that his sentence should be vacated and that he should be given the opportunity to contest, at a hearing, the alleged erroneous statements in the presentence report.

Statement of the Case

A. The Trial *

The evidence at trial established that the Appellant Francisco Solimene and his co-defendants, Joseph Averso, Louis Boyce and Felice Bonetti, were the principal architects of and participants in a major conspiracy to smuggle large amounts of heroin into the United States from South America. The conspiracy consisted of two groups, receivers and suppliers. The Appellant Solimene and his co-defendants Averso and Boyce were the direct receivers of a 150 pound shipment of heroin which the co-defendant Bonetti, head of the supplier group, shipped to the United States from South America.

Judge Rosling to a prison term of 15 years and a special parole term of 10 years. The other two co-defendants, Joseph Averso and Felice Bonetti, were fugitives at the time of trial. Subsequent thereto, the co-defendant Averso was apprehended, entered a plea of guilty to the indictment and thereafter cooperated with the Government. The co-defendant Bonetti is still at large.

* Appellant's judgment of conviction was affirmed by this Court on March 7, 1973 without opinion. (*United States* v. *Boyce*, 472 F.2d 1404). Appellant's petition for a writ of certiorari to the Supreme Court was denied on October 9, 1972 (414 U.S. 819). For a fuller statement of the evidence adduced at appellant's trial, this Court is respectfully referred to the brief of the United States, pages 2-9, which has been reproduced in the Government's Appendix at A. 24-A. 31.

More specifically, on May 28, 1971, at the St. Moritz Hotel, Appellant agreed with co-defendant Felice Bonetti and others to finance the cost of large shipments of heroin to be imported from South America by Bonetti and to be purchased by Boyce, Averso and Solimene (R. 255-57, 847-55).* Bonetti explained that eventually Solimene would have to travel to South America to meet the person who would be responsible for actually bringing the heroin into the United States (R. 263-65). Solimene agreed to this. After the meeting, appellant met with Averso and Boyce and advised them of the terms of the heroin transaction (R. 265-69).

Subsequently, on June 29, 1971, Solimene travelled to South America and thereafter met with one San Martin.** also known as Benito Brondarbit, and arranged for the importation of the heroin (R. 316-18). Solimene returned to the United States on July 4, 1971, and went immediately to Averso's apartment where he met with Averso and Americo Altamirano*** (R. 316; Government Trial Exhibit 23). There Solimene related how he had been met by Bonetti in Buenos Aires and was later introduced to San Martin, the man who would be coming to New York to deliver the heroin (R. 316-17).

On July 6, 1971, San Martin arrived in the United States. Two days later, in the evening, San Martin met Solimene, Averso and Altamirano for dinner. He advised them that the person actually bringing the heroin to New York was expected on July 9th, and that San Martin

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* Page references in parenthesis refer to the trial transcript.

** Although an unindicted co-conspirator in this case, San Martin was convicted in *United States* v. *San Martin*, 469 F.2d 5 (2d Cir. 1972).

*** Americo Altamirano, previously convicted in *United States* v. *San Martin, supra,* testified for the Government at appellant's trial.

would call Averso's apartment upon hearing from this person.

At virtually the same time this dinner meeting was taking place, on July 8th at 7:00 P.M., Rafael Richard * was arrested at John F. Kennedy Airport in possession of 155 pounds of heroin as he tried to enter the United States from Panama with a diplomatic passport (R. 142-178). Subsequently, both Richard and his uncle, Guillermo Gonzalez,** who was arrested the following day after he had entered the United States from Panama, agreed to cooperate with Customs agents. Accordingly, the agents were able to observe the actions of Gonzalez, San Martin, Americo Altamirano, and Cesar Altamirano, Americo's brother, as the latter three attempted to effect delivery of the heroin to appellant and his co-defendants Boyce and Averso.

B. Sentencing Proceedings

On May 19, 1972, appellant, represented by Theodore Rosenberg, Esq., appeared before Judge Rosling for sentencing. At the outset of the proceedings a full copy of the presentence report was turned over to appellant's counsel and made available to apellant for his review (See Transcript of May 19, 1972, p. 3; Government's Appendix, A. 16).

Sometime later, when the proceedings resumed, the Court stated it would hear any motions that the defendant

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* An unindicted co-conspirator in the instant case who had been indicted along with San Martin, cooperated with the Government, pleaded nolo contendere and received a sentence of three and one-half years imprisonment.

** An unindicted co-conspirator in the instant case who had been indicted along with San Martin, cooperated with the Government, pleaded nolo contendere and received a sentence of seven years imprisonment.

or counsel wished to make before sentence was imposed. Counsel then moved to set aside the verdict as against the weight of the evidence. Judge Rosling denied the motion (*id.*, at p. 4; Government's Appendix, A. 17). The District Court then afforded appellant as well as Mr. Rosenberg, an opportunity to make any statement in regard to the sentencing and to furnish any information relevant to the mitigation and reduction of punishment. Appellant stated that he was not guilty (*id.*, at p. 5; Government's Appendix, A. 18). Counsel then stated, on appellant's behalf, that appellant had "nothing to say to the Court" (*id.*, at p. 6; Government's Appendix, A. 19). The Court then stated to appellant: "Is that your desire?" Appellant responded, "Yes." During the ensuing allocution counsel indicated that this was the defendant's first offense although counsel acknowledged there was an outstanding charge mentioned in the presentence report. Thereafter, Judge Rosling again inquired whether appellant had anything to say. He replied in the negative. Appellant was then sentenced to a term of imprisonment of fifteen years and for a further special parole term of fifteen years. Following the imposition of sentence, appellant stated to Judge Rosling: "May I thank you?" Judge Rosling said: "If you wish." (*id.*, at pp. 7, 7a, Government's Appendix, A. 20, A. 21). At no time did appellant question the contents of the probation report.

C. Post Conviction Proceedings

On February 4, 1974, nearly four months following the Supreme Court's denial of his petition for a writ of certiorari, appellant moved, *pro se*, pursuant to Rule 35 F. R. Crim. P., for reduction of the sentence provided for by the late Judge Rosling (see Motion Pursuant to Rule 35; Government's Appendix, A. 37-A. 39). That motion was assigned to Judge Mishler, who, since the death of Judge Rosling had been assigned all matters dealing with the criminal case against appellant and his co-defendants. In

his motion, appellant urged the Court to reduce his sentence in the exercise of its discretion. In the course of his motion appellant conceded that it was legally proper and that the sentence was within the discretion of the trial court. Nevertheless, he asserted that he was "not a major figure in the alleged criminal venture" * (*id.*, Government's Appendix, A. 38). In support of the foregoing assertion, appellant cited the Court to one sentence in the prosecutor's summation which appeared to cast appellant in a lessor role than that of his co-conspirators, Richard and San Martin. Appellant concluded his motion with a simple request for leniency.**

On March 11, 1972, Chief Judge Mishler decided appellant's motion in the following Order:

> "Defendant moves to reduce the sentence imposed on May 20, 1972 by Judge George Rosling. [Footnote omitted]. Defendant was convicted after trial before a jury on a charge of conspiracy to import 155 pounds of heroin (95% pure) from Panama. Defendant was sentenced to a maximum term of 15 years, plus a special parole term of 15 years.
>
> The defendant describes himself as a 'minor figure' in the conspiracy. The pre-sentence report relating the details of the conspiracy indicates that defendant was a major participant in the conspiracy. On May 28, 1971, at the St. Moritz Hotel, defendant agreed with one Felice Bonnetti and others to finance

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* Appellant apparently abandoned his earlier claim made before Judge Rosling that he was not guilty even though he still spoke of the "alleged" conspiracy.

** Though appellant mentioned the fact that his sentence was longer than that of any of his co-defendants, he specifically disclaimed any attempt to raise a question of disparity of sentence, since, as he stated: "the sentence no matter how harsh, was within the Court's discretion . . ." (*id.*, at p. 2; Government's Appendix, A. 38).

the cost of large shipments of heroin imported from South America. Defendant traveled to South America and met with one San Martin, also known as Benito Brondarbit, and arranged for the importation of the heroin. The heroin was seized on July 8, 1971, when the suitcase of one Rafael Richard, Jr., son of the Panamanian Ambassador to China, was searched. The Government seized a safe deposit box maintained by the defendant containing $87,000 in cash.

There is no reason advanced for disturbing the sentence imposed.

Motion to reduce the sentence imposed is denied and it is.

SO ORDERED

The Clerk of the Court is directed to forward a copy of this memorandum of decision and order to the defendant." (Government's Appendix, A. 40-A. 41).

On March 26th—two weeks after Judge Mishler's order was entered—the Clerk of the District Court received a multi-page document from the appellant styled "Motion For Review Pursuant to Rule 35 of Federal Rules of Criminal Procedure: For the Denial Order of March 11th, 1974." As the docket sheets indicate (as well as a pencilled notation in the left hand corner of the first page), appellant's new motion was treated by the Clerk of the District Court as a Notice of Appeal from Judge Mishler's order of March 11th (see Docket Sheets, Government's Appendix, A. 6-A. 7). On the same day, the Clerk of the District Court forwarded to this Court the foregoing "Notice of Appeal," as well as appellant's motion of February 4 and Judge Mishler's order denying that motion (*id.*, Government's Appendix, A. 6-A. 7).

ARGUMENT

The District Court properly denied appellant's Rule 35 motion.

Appellant contends that the following two paraphrased statements in the presentence report are erroneous: (1) That appellant rented or maintained a safe deposit box in which $87,000 was found; and (2) that the magnitude of appellant's offense indicates that he must have had extensive financial backing and underworld connections. Additionally, appellant claims that the entire tenor of the presentence report improperly characterizes him as a major figure in the drug conspiracy while, to the contrary, appellant claims he played but a minor role in the criminal venture. He argues that Judge Rosling must have relied upon those allegedly erroneous statements and mis-characterizations when he was sentenced and that Judge Mishler, in denying his motion for reduction, carried forward that reliance. He argues that both proceedings were tainted by the misinformation in the report and that his sentence should be set aside pending a determination of his claims of inaccuracy.

(1)

As to appellant's last contention, namely that the presentence report improperly characterizes appellant as a major figure in the conspiracy, it need only be said that the record of trial more than amply supports the conclusion that appellant was one of the prime movers in the conspiracy (See Statement of Facts in Government's Brief, Government's Appendix, A. 24-A.31). Moreover, Judge Rosling, the sentencing judge, had presided over the trial from its inception and thus had knowledge of appellant's involvement independent of the presentence report.

As to appellant's carefully worded contention that he neither "rented nor maintained" (Appellant's Brief, p. 8)

the safe deposit box in which $87,000 was found, it should initially be noted that the trial record itself shows that appellant had access to the large sums of money used in the narcotics conspiracy (R. 328; see also, page 8 of Statement of Facts in Government's Brief, reproduced at page 30 of the Government's Appendix). More directly, on point, however, is the documentary evidence that, on January 4, 1972, within a month of appellant's arrest, his wife, Cilotte Solimene, executed a written statement at the request of the Manufacturer's Hanover Trust Co. in which she acknowledged ownership of a safe deposit box in that bank, voluntarily consented to have its contents examined, and stated that the $87,000 found therein had been given to her by her husband from time to time (See Statement of Cilotte S. Solimene, Government's Appendix, A. 50-A. 52). She further indicated that her husband told her that the money was from a business venture, but that he had declined to reveal the nature of this business (*id.*).*

As to appellant's contention that the mention of alleged "underworld connections" in the presentence report was erroneous and unsubstantiated, it is clear that this lonely assumption in the presentence report was hardly of great magnitude. In fact, that conclusion, was prima facie based on the agents' speculation.** Accordingly, there is little likelihood that this statement could have misled the sentencing judge. In all events even if the

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* Because appellant's motion in the District Court did not directly question the accuracy of the probation report, Mrs. Solimene's statements (Government's Appendix, A. 50-A. 54) were not presented to Judge Mishler. They have been produced before this Court in order to more directly answer appellant's claim of inaccuracy. The originals of the statements are now in the Government's possession, having recently been located and obtained from the Manufacturers Bank. They will be provided at the request of the Court.

** The report stated: "Agents advise that the defendant's present offense is on such a large scale that he must certainly have extensive financial backing and underworld connections."

statement were taken at more than face value there is no evidence that Judges Rosling and Mishler considered it as further aggravating the immensity of apellant's crime.

From the foregoing, it can readily be seen that the characterizations and statements in the presentence report complained of by the appellant were either entirely accurate or, as in the case of the so-called "underworld" reference, negligible. Since appellant has failed to show that either Judge Rosling or Judge Mishler relied on material information that was in fact not true, Judge Mishler's denial of the Rule 35 motion was proper. See, *United States* v. *Needles,* 472 F.2d 652, 656-659 (2d Cir. 1973); compare, *Townsend* v. *Burke,* 334 U.S. 736 (1948); *United States* v. *Malcolm,* 432 F.2d 809 (2d Cir. 1970).

(2)

In addition to his claim that the presentence report contained erroneous statements and misleading characterizations of his role in the conspiracy appellant contends that it was error for Judge Mishler to deny him an evidentiary hearing in which appellant might have been confronted with the allegedly erroneous evidence and have had an opportunity to rebut this evidence. As the Government has already demonstrated, the statements and characterizations were neither erroneous nor misleading. Hence, there was no need to hold an evidentiary hearing.

Appellant seems to contend though, that even aside from the question of the accuracy of the presentence report he had a right to be confronted with the evidence against him and to rebut it. He impliedly asserts a right not to have hearsay evidence considered by the sentencing judge. However, the law is clear that the judge may rely upon hearsay information in imposing sentence. See *Williams* v. *New York,* 337 U.S. 241, 246-257 (1949); *Williams* v. *Oklahoma* 358 U.S. 576, 584 (1959); *Manley* v. *United*

States, 432 F.2d 1241, 1245 (2d Cir. 1970); *United States* v. *Doyle,* 348 F.2d 715, 721 (2d Cir.), *cert. denied,* 382 U.S. 843 (1965). Contrary to appellant's assertions, it is not required that each statement in a presentence report be established by supporting evidence, *Williams* v. *New York, supra; United States* v. *Needles, supra.* The manner of rebutting hearsay assertions in a presentence probation report rest on the informed discretion of the sentencing judge. The tender of an unsupported claim does not mandate an evidentiary hearing. *United States* v. *Rosner,* 485 F.2d 1213, 1230 (2d Cir. 1973); *United States* v. *Needles,* supra at 658. Moreover, it cannot be said in the instant case that appellant was denied an opportunity to rebut and respond to the information contained in his presentence report. Before imposing sentence, Judge Rosling provided appellant with a full copy of his presentence report and twice inquired whether appellant had anything to say in response thereto. Appellant maintained his silence except to deny guilt. As this court held in ***Manley*** **v.** ***United States, supra,*** permitting petitioner's counsel to review his probation report at the time of sentencing and to point out errors therein to the court is sufficient to protect the fundamental rights of a defendant. Accordingly, appellant should not be heard to claim that he has not been provided an opportunity to present evidence in rebuttal of the report's assertions. See also, *United States* v. *Holder,* 412 F.2d 212, 215 (2d Cir. 1969).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

August 19, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
GEORGE G. BASHIAN, JR.,
Assistant United States Attorneys,
*of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Leslie Phillips Rudman, a third year law student at Hofstra University Law School in the preparation of this brief.

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No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 19th day of August, 1974, I deposited in Mail Chute Drop for mailing/in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a ~~BRIEF FOR THE APPELLEE and GOVERNMENT'S APPENDIX~~ two copies of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Francisco Solimene
Reg. No. 75818-158
U. S. Penitentiary
P. O. Box 1000
~~Leavenworth, Kansas 66048~~

Sworn to before me this
19th day of August, 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 19-1/

Lydia Fernandez

LYDIA FERNANDEZ

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____
_____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-SM-8-73-7358